

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BRENDA K. GEORGE**  
Claimant

VS.

**GENERAL MOTORS CORPORATION**  
Self-Insured Respondent

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Docket No. 1,039,182

**ORDER**

Claimant appealed the May 14, 2012, Award entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Workers Compensation Board heard oral argument on September 5, 2012. Jeffrey E. King, of Salina, Kansas, was appointed as a Board Member Pro Tem for purposes of this appeal in place of former Board Member David A. Shufelt.

**APPEARANCES**

Michael R. Wallace of Shawnee Mission, Kansas, appeared for claimant. Peter J. Chung of Kansas City, Missouri, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument claimant's attorney indicated claimant was not pursuing the issue of the amount of claimant's contribution to her retirement plan.

**ISSUES**

ALJ Hursh found claimant sustained a 10% functional impairment to the low back as the result of a March 10, 2008, work-related repetitive injury. Claimant was determined to be permanently and totally disabled. ALJ Hursh awarded claimant 41.5 weeks of permanent partial disability benefits at the rate of \$510.00 per week for the 10% functional impairment, followed by permanent total disability benefits. Claimant retired on July 1, 2009, and is receiving \$189.92 per week in retirement benefits. In his Award, ALJ Hursh imposed the following retirement credit against claimant's permanent total disability benefits:

The retirement credit and the permanent total disability in this case both started on July 1, 2009. The claimant would be due 41.5 weeks of benefits at the unreduced \$510 compensation rate for her functional disability prior to July 1, 2009. The total amount due for functional disability is \$21,165.00, leaving \$103,835.00 available under the statutory cap. At the maximum compensation rate of \$510, permanent total benefits would be paid for 203.60 weeks to reach \$103,835.00. Permanent total benefits shall be awarded at the reduced rate of \$320.08 for a maximum of 203.60 weeks.<sup>1</sup>

The effect of ALJ Hursh's Award was to reduce claimant's maximum permanent total disability benefits from \$103,835.00 to \$65,168.29.

Claimant does not dispute that her weekly compensation rate for the permanent total disability benefits should be reduced to \$320.08 per week, but maintains the ALJ erred in reducing the maximum total award of those benefits to \$65,168.29. Claimant argues she is entitled to the \$320.08 weekly benefit for the duration of her permanent total disability for a total award not to exceed \$125,000.00. In support of her foregoing argument, claimant cites the Kansas Supreme Court case of *McIntosh*<sup>2</sup> and the Board's order in *Miller*.<sup>3</sup>

Respondent points to the statutory interpretation language in *Casco*<sup>4</sup> and maintains that the ALJ correctly applied K.S.A. 2007 Supp. 44-501(h).

The issue before the Board on this appeal is:

What is the correct method for calculating and applying the retirement benefit offset against claimant's award of permanent total disability benefits under K.S.A. 2007 Supp. 44-501(h)?

### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant sustained a repetitive work-related injury on March 10, 2008, and retired on July 1, 2009. Claimant is receiving retirement benefits of \$823.00 per month, or

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<sup>1</sup> ALJ Award (May 14, 2012) at 4.

<sup>2</sup> *McIntosh v. Sedgwick County*, 282 Kan. 636, 147 P.3d 869 (2006).

<sup>3</sup> *Miller v. Walmart*, No. 1,050,117, 2012 WL 1652958 (Kan. WCAB Apr. 13, 2012).

<sup>4</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

\$189.92 per week. The Award of the ALJ sets out detailed findings of fact in the section entitled “**FINDINGS**.” It is not necessary to repeat those herein.

**PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2007 Supp. 44-501(h) provides:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

K.S.A. 44-510f states in part:

(a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

(1) For permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments paid or due, \$125,000 for an injury or any aggravation thereof . . . .

Claimant urges the Board to follow *McIntosh*, wherein claimant was permanently and totally disabled. The Kansas Supreme Court reduced claimant's weekly compensation benefits by offsetting his weekly retirement benefits, but did not reduce the total compensation below the statutory cap of \$125,000.00. The Kansas Supreme Court affirmed an earlier ruling of the Kansas Court of Appeals and stated, “The Court of Appeals explained that the offset provision in K.S.A. 2005 Supp. 44-501(h) serves only to delay the time it takes to reach the \$125,000 cap, not to impose a cap on the number of weeks that compensation may be received. 34 Kan. App. 2d at 693.”<sup>5</sup>

Respondent asserts that K.S.A. 2007 Supp. 44-501(h) is unambiguous and, therefore, *Casco* requires an interpretation of K.S.A. 2007 Supp. 44-501(h) which supports the ALJ's finding. In its brief to the Board respondent cites the following passage in *Casco*:

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<sup>5</sup> *McIntosh*, 282 Kan. at 640.

When construing statutes, we are required to give certain effect to the legislative intent if that intent can be ascertained. When a status *[sic]* is plain and unambiguous, we must give effect to the legislature's intention as expressed rather than determine what the law should or should not be. *Foos v. Terminix*, 277 Kan.[] 687, 695 (2004). A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute. *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 15 (2003). *McIntosh*, 282 Kan. at 520 *[sic]*.<sup>6</sup>

The foregoing quotation from *Casco* is incorrect. *Casco* does not mention *McIntosh*. The actual quote from *Casco* is as follows:

When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. *Foos*, 277 Kan. at 695. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute. *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 15, 81 P.3d 425 (2003).<sup>7</sup>

The Board is mindful that *Casco* provides that when a statute is plain and unambiguous, the courts must give effect to the legislature's intention as expressed rather than determine what the law should or should not be. That same rule of statutory construction was set out in Syllabus 2 of *McIntosh*. In *McIntosh*, the Kansas Supreme Court determined the construction of K.S.A. 2005 Supp. 44-501(h) was ambiguous as it could be interpreted in such a way as to support both claimant and respondent's viewpoint. Consequently, the Court in *McIntosh* ascertained the legislature's intent behind K.S.A. 2005 Supp. 44-501(h) by considering the entire workers compensation act. The Court noted the only express limitation on total compensation received for permanent total disability was the \$125,000.00 limit set out in K.S.A. 44-510f(a)(1). The Court also relied on that part of K.S.A. 44-510c(a)(1) which states, "The payment of compensation for permanent total disability shall continue for the duration of such disability, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto."

*Casco* does not overturn *McIntosh*. In both cases the Kansas Supreme Court used the same sequential analysis. It first determined whether the statute in question was plain and unambiguous. If the applicable statute was unambiguous, as in *Casco*, the Court applied the plain and unambiguous language of the statute. Where the applicable statute was ambiguous, as the Court determined K.S.A. 2005 Supp. 44-501(h) was in *McIntosh*, the Court then attempted to discern the intent of the Legislature and looked at the entire

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<sup>6</sup> Respondent's Brief (filed July 5, 2012) at 2.

<sup>7</sup> *Casco*, 283 Kan. at 521.

workers compensation act for guidance. Simply put, the Board declines to overturn *McIntosh* and finds claimant's permanent total disability benefits are capped only by the statutory maximum set out in K.S.A. 44-510f(a)(1).

### **CONCLUSION**

Claimant is entitled to \$320.08 per week for the duration of her permanent total disability, for a total award not to exceed \$125,000.00.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>8</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board modifies the May 14, 2012, Award entered by ALJ Hursh and modifies paragraph two under the section entitled "**AWARD**" on pages four and five of the Award as follows:

The respondent and insurance carrier shall pay the claimant 41.5 weeks of permanent partial disability benefits at the rate of \$510.00 per week for a 10% impairment to the whole person for a total of \$21,165.00, followed by permanent total disability benefits at the rate of \$320.08 commencing July 1, 2009, until the sum of \$103,835.00 is paid. Claimant's total award is \$125,000.00. As of October 16, 2012, 172 weeks of permanent total disability benefits for a total of \$55,053.76 is due and owing along with \$21,165.00 in permanent partial disability benefits, for a total of \$76,218.76, which shall be paid in a lump sum less any amounts previously paid. The remaining permanent total disability payments shall be paid at the rate of \$320.08 per week until \$48,781.24 is paid or until further order of the Director.

The remainder of ALJ Hursh's Award is affirmed to the extent it is not inconsistent with the above.

**IT IS SO ORDERED.**

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<sup>8</sup> K.S.A. 2011 Supp. 44-555c(k).

Dated this \_\_\_\_ day of October, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge